Supreme Court, U.S.
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Supreme Court of the United States

LOUIS EVANGELISTA,

Petitioner,

-v-

JOHN ASHCROFT, Attorney General of the United States; MICHAEL J. GARCIA, Acting Assistant Secretary of the U.S. Immigration and Customs Enforcement; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case involves an issue left unresolved by this Court's decision in INS v. St. Cyr, 533 U.S. 289 (2001). In INS v. St. Cyr, this Court held that the retroactive application of amendments from 1996 to the Immigration and Nationality Act could not be applied retroactively to aliens who pleaded guilty prior to the enactment of those amendments. INS v. St. Cyr was silent as to whether those amendments could be applied retroactively to aliens that committed their criminal conduct prior to those amendments, but were convicted afterwards.

Petitioner, an alien with lawful permanent resident status, engaged in criminal conduct prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (April 24, 1996), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "IIRIRA"), Pub. L. 104-208, 110 Stat. 3009-597 (September 30, 1996). AEDPA § 440(d) placed limitations on the availability of a form of relief from deportation proceedings found in former Immigration Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1995). IIRIRA completely repealed INA § 212(c). AEDPA was enacted after Mr. Evangelista's jury trial. IIRIRA was enacted while he was in prison. The Immigration Judge and the Board of Immigration Appeals ("Board" or "BIA") found that AEDPA and IIRIRA barred Mr. Evangelista from applying for 212(c) relief. Mr. Evangelista filed a *habeas corpus* petition challenging his removal order. Both the District Court and Court of Appeals upheld his removal order. The question presented is:

Whether the court of appeals erred when it applied AEDPA § 440(d) and IIRIRA § 304(b) retroactively to hold that the Petitioner, whose deportable criminal conduct occurred prior to the statutes' enactments, but who was convicted after their enactments, is ineligible for a waiver of deportation under INA § 212(c), 8 U.S.C. § 1182(c) (repealed 1996).

PARTIES TO THE PROCEEDINGS

The Petitioner is Louis Evangelista.

The Respondents are John Ashcroft, the Attorney General of the United States; Michael Garcia, the Acting Assistant Secretary of U.S. Immigration and Customs Enforcement; and U.S. Immigration and Customs Enforcement.[1]

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[1] The action below listed the following Respondents: John Ashcroft, Attorney General of the United States; James Ziglar, Commissioner, Immigration and Naturalization Service ("INS"); and Immigration and Naturalization Service. Pursuant to FED. R. APP. P. 43(c)(2), Michael J. Garcia, Acting Assistant Secretary of U.S. Immigration and Customs Enforcement ("ICE") substituted James Ziglar. Pursuant to the Homeland Security Act of 2002, Pub. L. 107-296 (January 24, 2003), the U.S. ICE substituted for the INS.

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PETITION FOR A WRIT OF *CERTIORARI*

Louis Evangelista respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, which dismissed Mr. Evangelista's appeal (App. 1a) is reported. See Evangelista v. Ashcroft, 359 F.3d 145 (2d Cir. 2004). The order denying his petition for rehearing and hearing *en banc* is not reported. (App. 53) The order by the District Court dismissing Mr. Evangelista's *habeas corpus* petition is not reported. (App. 21a). The decision and order of the Immigration Judge (App. 46a & 48a) and the Board of Immigration Appeals (App. 37a) are unreported .

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a). The judgment of the court of appeals was entered on February 23, 2004. On April 15, 2004, Mr. Evangelista timely filed a petition for panel rehearing and rehearing *en banc*. The petition for panel rehearing and rehearing *en banc* was denied on June 9, 2004.

STATUTORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition are former Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1995) (App. 55a), Section 440(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) (App. 55a), Immigration and Nationality

Act § 212(c), 8 U.S.C. § 1182(c) (1997), as amended by AEDPA § 440(d) (App. 55a), and Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, 110 Stat. 3009–546 (September 30, 1996) (App. 56a). This matter does not involve any Constitutional provisions.

STATEMENT OF THE CASE

I. STATUTORY AND CASE LAW BACKGROUND

For decades prior to the immigration law amendments of 1996, lawful permanent resident immigrants charged with committing a crime had a statutory right to seek a waiver of any resulting charge of excludability or deportability under Section 212(c) of the Immigration and Nationality Act ("INA"), provided the immigrant had been lawfully domiciled in the United States for seven years. See former INA § 212(c), 8 U.S.C. § 1182(c) (1994), as added by Immigration and Nationality Act of 1952; see also Francis v. INS, 532 F.2d 268 (2d Cir. 1976) (holding that 212(c) relief is available in deportation as well as exclusion proceedings); Matter of Silva, 16 I & N Dec. 26 (BIA 1976) (adopting and applying the Francis holding nationwide). The 212(c) waiver was unavailable only for individuals convicted of "aggravated felonies" for which they had served five or more years in prison. See former INA §212(c), 8 U.S.C. § 1182(c) (1994).

In 1996, Congress amended the Immigration and Nationality Act twice. First, in section 440(d) of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Congress barred 212(c) waivers for several categories of criminal offenses. Pub. L. No. 104-132, 110 Stat. 1214 (1996). Subsequently, in section 304(b) of the Illegal Immigration

Reform and Immigrant Responsibility Act ("IIRIRA"), Congress repealed 212(c) and replaced it with a form of relief called "cancellation of removal" that is unavailable for individuals convicted of any aggravated felony, regardless of time served. INA § 240A(a), 8 U.S.C. § 1229b(a) (Supp. V 1999).

In 1998, the Second Circuit held that Congress did not intend for AEDPA § 440(d) to be applied in deportation cases that were pending when AEDPA was enacted. Henderson v. INS, 157 F.3d 106 (2d Cir. 1998), cert. denied sub nom. Reno v. Navas, 526 U.S. 1004 (1999).

In September 2000, after finding Congress's intent unclear with respect to the application of AEDPA 440(d) and IIRIRA 304(b) to pre-enactment convictions in deportation cases not yet pending on the effective dates of these laws, the Second Circuit applied the traditional presumption against retroactive application of a new civil statute and held that the AEDPA and IIRIRA bars to applying for 212(c) relief do not extend to a lawful permanent resident who pled guilty or nolo contendere to an otherwise qualifying crime prior to the enactment dates of these laws. St. Cyr v. INS, 229 F.3d 406 (2d Cir. 2000). The Second Circuit's decision in St. Cyr included a brief discussion, not necessary to the holding of that case, suggesting that the AEDPA and IIRIRA bars may otherwise be permissibly applied to pre-enactment conduct. Id. at 419. Prior to St. Cyr, several district courts within the Second Circuit had concluded that AEDPA and IIRIRA could not be applied retroactively to criminal conduct that had occurred prior to the enactment of those statutes. See Pottinger v. Reno, 51 F. Supp. 2d 349, 362 (E.D.N.Y. 1999); Maria v. McElroy, 68 F.2d 206, 229-230 (E.D.N.Y. 1999); Pena-Rosario v. Reno, 83 F.Supp. 2d 349, 365-66 (E.D.N.Y. 2000).

While the St. Cyr case was pending before the Supreme Court, the Second Circuit held in Domond v. INS, 244 F.3d 81 (2d Cir. 2001), that the AEDPA and IIRIRA bars may be applied to individuals whose underlying criminal conduct occurred before the enactment of the 1996 immigration law amendments, but whose convictions occurred post-enactment. Id. at 86. In reaching its holding, the Domond panel reasoned that because 212(c) waivers are a form of discretionary relief, their loss "does not impose a new legal consequence on [an alien's] pre-AEDPA criminal conduct." Id. at 85-86.

On appeal, the Supreme Court in INS v. St. Cyr, 533 U.S. 289 (2001), upheld the Second Circuit's holding that the AEDPA and IIRIRA bars do not apply to pre-enactment pleas, but did not address the lower Court's *dicta* regarding the application of the statutes to pre-enactment conduct. However, the Supreme Court held in St. Cyr that the loss of a "significant likelihood of receiving § 212(c) relief," even though such relief is discretionary, constitutes a new legal effect that is impermissibly retroactive. 533 U.S. at 321-325. While the decision in Domond was not discussed, the Supreme Court's holding in St. Cyr directly contradicts the rationale of the Domond decision.

The first precedent decision to address the viability of Domond after St. Cyr was Mohammed v. Reno, 309 F.3d 95 (2d Cir. 2002). This decision vacated a stay of removal issued by Judge Gleeson in Mohammed v. Reno, 205 F. Supp. 2d 39 (E.D.N.Y. 2002). Judge Gleeson followed Domond, but called its holding into question and granted a stay of removal to Mr. Mohammed, so that he could appeal the court's decision.

Judge Gleeson noted that under this Court's retroactivity analysis that was established in Landgraf v. USI

Film Prod., 511 U.S. 244, 270 (1994), reliance is only one of the benchmarks for determining retroactive effect; there is also fair notice, and settled expectations. 205 F. Supp. 2d at 44-45. Judge Gleeson concluded that applying fair notice and settled expectations, AEDPA § 440(d) has an impermissible retroactive effect upon aliens that committed criminal acts prior to AEDPA's enactment, but were convicted afterwards. 205 F. Supp. 2d at 46-48. Judge Gleeson also noted that the *Ex Post Facto* Clause is used by this Court in its Landgraf analysis to determine the retroactive effect of a statute. 205 F. Supp. 2d at 41.

In Mohammed v. Reno, 309 F.3d 95 (2d Cir. 2002), the Second Circuit held that Domond remained good law, in light of the Supreme Court's decision in INS v. St. Cyr. The Second Circuit's determination that Domond remained good law only addressed reliance and not fair notice and settled expectations. 309 F.3d at 102-103. Nor did the decision address the *Ex Post Facto* cases of this Court. Since Mohammed, the Second Circuit has repeatedly reaffirmed Domond without any detailed analysis. See Rankine v. Reno, 319 F.3d 93 (2d Cir. 2002); Beharry v. Ashcroft, 329 F.3d 51, 63 (2d Cir. 2003); Hibbert v. Ashcroft, Dkt. No. 02-2281, 2003 WL 21466746 (2d Cir. June 20, 2003). In Mr. Evangelista's case, the panel recognized that Judge Gleeson had called Domond into question, but followed Domond without directly addressing these issues. 359 F.3d at 154-55.

Despite the numerous precedent decisions on this issue, the Second Circuit has yet to issue a single decision evaluating the retroactivity of AEDPA and IIRIRA under the fair notice and reasonable expectation benchmarks. Nor has the Second Circuit considered *Ex Post Facto* cases in its determinations that AEDPA and IIRIRA are not impermissibly retroactive to

individuals like Mr. Evangelista.

II. MR. EVANGELISTA'S PROCEEDINGS

A. BACKGROUND ABOUT LOUIS EVANGELISTA

Mr. Evangelista is a native and citizen of Italy. He was born on December 24, 1940. He is sixty-three years old. He was admitted to the United States on or about October 26, 1961, as a lawful permanent resident. Mr. Evangelista has resided in the United States for forty-two years. In 1960, Mr. Evangelista married Lucy Evangelista, who is a naturalized United States citizen. The couple has five adult children who were born in the United States.

On or about December 18, 1994, Mr. Evangelista was arrested in the Eastern District of New York on federal income tax charges. On February 25, 1995, a superseding indictment was returned against him, which contained twenty six counts relating to tax offenses, which involved events dating back to 1987. The twenty-sixth count was pursuant to 26 U.S.C. § 7201, which involves evading or defeating income tax. According to count 26 of the indictment, Mr. Evangelista attempted to "evade and defeat" a net income tax in the amount of $335,830, which was assessed on negative income claimed by Mr. Evangelista. According to count 26 of the indictment, the events relating to this count occurred on or about June 14, 1991. At the time of Mr. Evangelista's criminal conduct, he was eligible for a waiver of deportability pursuant to INA § 212(c), 8 U.S.C. § 1182(c) (1995).

Mr. Evangelista entered a plea of not guilty to the indictment. On February 28, 1996, a jury returned a verdict of

guilty on all of the counts of the indictment charged against Mr. Evangelista, including the charge under 26 U.S.C. § 7201. Mr. Evangelista was sentenced to serve fifty-one months of incarceration. Mr. Evangelista appealed his conviction to the Second Circuit, which rendered a precedent decision upholding his conviction. United States v. Evangelista, 122 F.3d 112, 114 (2d Cir. 1997).

B. MR. EVANGELISTA'S REMOVAL PROCEEDINGS BEFORE THE IMMIGRATION JUDGE

As a result of Mr. Evangelista's conviction, the Immigration and Naturalization Service ("Service") issued a Notice to Appear ("NTA") against Mr. Evangelista on April 14, 1998. The NTA is the official charging document that informs an alien that he or she is in removal proceedings and informs the alien of the allegations of fact and charges of inadmissibility or deportability being leveled against him or her. See INA § 239, 8 U.S.C. § 1229. The NTA indicated that as a result of his having been convicted of 26 U.S.C § 7201, Mr. Evangelista was removable pursuant to INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony as defined in INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). The NTA was orally amended to indicate that he was convicted of an aggravated felony as defined in INA § 101(a)(43)(M)(ii), 8 U.S.C. § 1101(a)(43)(M)(ii), which is an offense that is "described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000."

Before the Immigration Judge, Mr. Evangelista

contended that he was not an aggravated felon.[2] He also sought a waiver pursuant to former INA § 212(c). Mr. Evangelista contended that since at the time of his criminal conduct he was eligible for a waiver pursuant to INA § 212(c), he should continue to remain eligible for that form of relief.

On April 11, 2000, the Immigration Judge issued an oral decision. (App. 48a). The Immigration Judge found that Mr. Evangelista was removable. The Immigration Judge concluded that Mr. Evangelista was ineligible for 212(c) relief because IIRIRA could be applied retroactively to him. Mr. Evangelista filed a motion to reconsider with the Immigration Judge. On June 2, 2000, the Immigration Judge denied the motion to reconsider. (App. 46a). Mr. Evangelista filed timely appeals with the Board of both the April 11, 2000, and the June 2, 2000, orders from the Immigration Judge.

C. MR. EVANGELISTA'S APPEAL TO THE BOARD OF IMMIGRATION APPEALS

On October 25, 2000, the Board rendered a decision dismissing both of Mr. Evangelista's appeals. (App. 37a). The Board concluded that Mr. Evangelista was an aggravated felon. The Board concluded that Mr. Evangelista was ineligible for 212(c) relief because IIRIRA's repeal of 212(c) was retroactive.

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[2] Mr. Evangelista contended that since INA § 101(a)(43)(M)(ii) only made tax evasion and not defeating taxes a removable offense, and that since his indictment was phrased in the disjunctive, the Service was required to prove by clear and convincing evidence that he had been convicted of evading taxes, as opposed to defeating taxes. Mr. Evangelista raised this issue to the Board, to the U.S. District Court, and to the U.S. Court of Appeals. However, his removability is not the basis of this petition. This petition is based solely upon his eligibility for 212(c) relief.

D. MR. EVANGELISTA'S DISTRICT COURT PROCEEDINGS

On September 13, 2001, Mr. Evangelista filed a *habeas corpus* petition in the Eastern District of New York. The *habeas corpus* petition challenged Mr. Evangelista's removal order on the basis that the Service failed to establish that he was removable, since it was not established that he had evaded income taxes, as opposed to having defeated income taxes. Mr. Evangelista also argued that IIRIRA could not be applied retroactively to preclude him from applying for 212(c) relief because his criminal conduct predated IIRIRA.

On November 22, 2002, U.S. District Judge Leonard D. Wexler issued a Memorandum and Order dismissing Mr. Evangelista's *habeas corpus* petition. (App. 21a). Like the Board, Judge Wexler, concluded that Mr. Evangelista had been convicted of "evading" income taxes pursuant to 26 U.S.C. § 7201. In holding Mr. Evangelista ineligible for 212(c) relief, Judge Wexler cited to Domond v. INS, 244 F.3d 81 (2d Cir. 2001) and Mohammed v. Reno, 309 F.3d 95 (2d Cir. 2002).

E. MR. EVANGELISTA'S PROCEEDINGS BEFORE THE COURT OF APPEALS

Mr. Evangelista filed a timely notice of appeal to the U.S. Court of Appeals for the Second Circuit. The Second Circuit dismissed Mr. Evangelista's appeal on February 23, 2004, in a precedent decision, Evangelista v. Ashcroft, 359 F.3d 145 (2d Cir. 2004). (App. 1a). The Second Circuit recognized that the district courts in Mohammed v. Reno, 205 F. Supp. 2d 39 (E.D.N.Y. 2002), stay vacated, 309 F.3d 95 (2d Cir. 2002) and Beharry v. Reno, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), rev'd sub nom Beharry v. Ashcroft, 329 F.3d 51 (2d Cir.

2003) criticized its decision in Domond as being inconsistent with St. Cyr. 359 F.3d at 154-55. Nevertheless, the Second Circuit followed Domond without addressing these criticisms. 359 F.3d at 154-55. Mr. Evangelista filed a timely petition for panel rehearing and rehearing *en banc*, which was denied on June 9, 2004. (App. 53a). The instant petition for *certiorari* seeks review of that court of appeals judgment.

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S DECISION IN INS v. ST. CYR HAS IMPLICITLY OVERRULED THE SECOND CIRCUIT'S DECISION IN DOMOND v. ASHCROFT

The Court should grant the petition for *certiorari* because the decision relied upon by the Second Circuit to deny Mr. Evangelista's *habeas corpus* petition has been implicitly overturned by this Court's decision in INS v. St. Cyr. This Court held in INS v. St. Cyr that despite the discretionary nature of section 212(c), its elimination does have legal consequences, and thus, impermissible retroactive effect. 533 U.S. at 325. The Supreme Court stated, "(t)here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation." 533 U.S. at 325. This statement implicitly overrules Domond.

By contrast, in Domond the Second Circuit held that the limitations on 212(c) relief created by AEDPA § 440(d) do not have retroactive effect because 212(c) relief is discretionary. 244 F.3d at 85-86. Logic dictates that the Supreme Court's decision in INS v. St. Cyr cannot contradict Domond, yet not

undermine Domond. In Mohammed v. Reno, United States District Court Judge John Gleeson of the Eastern District of New York recognized that the Supreme Court's decision in St. Cyr conflicts with Domond because this Court held that taking away discretionary relief can have a retroactive effect. 205 F. Supp. 2d at 44-45. However, in Mohammed, the Second Circuit gave the following rationalization as to why Domond has not been overturned:

> We think the Domond quotation has been taken too literally. The panel was obviously aware that, prior to AEDPA, section 212(c) relief often spared an alien from being removed from this country. The panel's statement is properly understood to mean only that an order for deportation was always imposed, even though not always carried out. In any event, the Supreme Court's focus on the shift from possible to certain deportation was explicitly tied to the alien's reliance on the prior availability of discretionary relief in deciding to plead guilty.

309 F.3d at 103.

The reasoning of the Mohammed panel is a post *hoc* rationalization. Moreover, the Second Circuit's decision in Mohammed is flawed because reliance is not the sole determinative factor in deciding whether a statute has an impermissible retroactive effect. See Part II, *infra*.

II. THIS COURT HAS NEVER REQUIRED THAT THERE ONLY BE A *QUID PRO QUO* AND RELIANCE IN ORDER FOR A STATUTE TO BE IMPERMISSIBLY RETROACTIVE

This Court should grant the petition for *certiorari* because the Second Circuit has misinterpreted this Court's decision in INS v. St. Cyr. In St. Cyr, this Court stated that, "(a)s we have repeatedly counseled, the judgment whether a particular statute acts retroactively 'should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.'" 533 U.S. at 321 (quoting Martin v. Hadix, 527 U.S. 343, 357-58 (1999) (in turn quoting Landgraf v. USI Film Prod., 511 U.S. 244, 270 (1994)). But in Domond and its progeny, the Second Circuit has read these words as if "fair notice," "reasonable reliance," and "settled expectations" were synonymous. As a result of its misreading of INS v. St. Cyr, the Second Circuit only considers whether there was reliance in order to determine whether a statute is impermissibly retroactive under the second tier of the Landgraf test.

Moreover, the Second Circuit appears to be requiring that there be a *quid pro quo*, as well. See e.g., Rankine v. Reno, 319 F.3d 93, 100 (2d Cir. 2002) ("If they had pled guilty, petitioners would have participated in the *quid pro quo* relationship, in which a greater expectation of relief is provided in exchange for forgoing a trial, that gave rise to the reliance interest emphasized by the Supreme Court in St. Cyr."). These are requirements that this Court has never imposed. The St. Cyr Court was just observing that there was reliance and a *quid pro quo* present in Mr. St. Cyr's case. The Court did not hold that reliance and a *quid pro quo* were required in order to show

that a statute has an impermissible retroactive effect. Recently, the Third Circuit in Pounnapula v. Ashcroft, 373 F.3d 480 (3d Cir. 2004), recognized that the type of reliance that requires a *quid pro quo* is not the only way to establish that a statute is impermissibly retroactive id. at 499. The Third Circuit in Pounnapula stated:

> We agree that the kind of *quid pro quo* inherent in the acceptance of a plea agreement is one way to prove reliance; as we note above, the action and forbearance implicit in a *quid pro quo* is strong evidence of reliance. But it is surely not the only way to establish reliance, much less the talisman that the INS makes it out to be. An individual can rely or have settled expectations about a state of affairs without having to enter into an exchange to secure or assure it.
>
> 373 F.3d at 499.

In Pounnapula, the Third Circuit rejected the Second Circuit's decision in Rankine and held that IIRIRA's repeal of 212(c) could not be applied to an alien who turned down a plea agreement and elected to go to trial in reasonable reliance of 212(c) relief. In light of Pounnapula, there is a circuit split regarding whether a *quid pro quo* is necessary to demonstrate that a statute is impermissibly retroactive.

The Second Circuit's requirement of a *quid pro quo* and reliance would result in a different outcome in Landgraf v. USI Film Prod., 511 U.S. 244 (1994) and Rivers v. Roadway Exp. Inc., 511 U.S. 298 (1994). This is because there was no reliance or *quid pro quo* in Landgraf or Rivers. In both of these

cases, this Court held that statutes, which increased civil liability, could not be applied retroactively to pre-enactment conduct. In addressing whether AEDPA § 440(d) has an impermissible retroactive effect for pre-enactment conduct, the Second Circuit in St. Cyr stated it would "border on the absurd to argue that" aliens would not have committed crimes if they knew discretionary relief from deportation would not be available. 229 F.3d at 418. Applying the Second Circuit's logic in Domond to Landgraf and Rivers, it would "border on the absurd" to believe that tortfeasors would refrain from tortious conduct, if they knew their monetary liability would be increased at a later date. In other words, the outcomes of Landgraf and Rivers would be different under Domond. St. Cyr did not intend to overrule Landgraf and Rivers.

III. THE SECOND CIRCUIT FAILED TO RECOGNIZE THAT THIS COURT ROUTINELY UTILIZES ANALYSIS FROM *EX POST FACTO* CASES IN DETERMINING WHETHER A STATUTE IS RETROACTIVE

This Court should grant the petition for *certiorari* because the Second Circuit has refused to utilize *Ex Post Facto* analysis in Domond and its progeny. Domond, 244 F.3d at 87. Because of this, Second Circuit retroactivity analysis is different from this Court's analysis. The Second Circuit was correct in Domond that the *Ex Post Facto* Clause of the Constitution does not apply to immigration proceedings. 244 F.3d at 87. However, in doing so, the Second Circuit ignored the fact that this Court regularly looks to *Ex Post Facto* cases by analogy when determining the retroactive effect of a civil statute. See e.g., Hughes Aircraft v. United States *ex. rel.* Schumer, 520 U.S. 939, 948 (1997) (citing Collins v. Youngblood, 497 U.S. 37 (1990) and Beazell v. Ohio, 269 U.S.

167, 169-70 (1925)); Landgraf, 511 U.S. at 269 n.23 (citing Miller v. Florida, 482 U.S. 423 (1987)). In fact, this Court relied upon an *Ex Post Facto* case, Lindsey v. Washington, 301 U.S. 397 (1937), in its decision in INS v. St. Cyr. 533 U.S. at 325.

The term "fair notice," which is one of the three retroactivity benchmarks mentioned in St. Cyr, originated in this Court's *Ex Post Facto* cases. See e.g., Lynce v. Mathis, 519 U.S. 433 (1997) ("this Court has consistently stressed 'lack of fair notice' as one of the 'central concerns of the Ex Post Facto Clause.'") (emphasis added) (quoting Weaver v. Graham, 450 U.S. 24, 30 (1981)); accord Carmell v. Texas, 529 U.S. 513, 566 (2000); Miller v. Florida, 482 U.S. 423, 430 (1987). In fact, "fair notice" is the benchmark in the Second Circuit's *Ex Post Facto* cases. See e.g., United States v. Brady, 26 F.3d 282, 291 (2d Cir. 1984) ("One of the principal aims of the *Ex Post Facto* clause is to ensure that individuals have fair notice of what conduct is criminally proscribed"). (emphasis added); United States v. Minicone, 960 F.2d 1099, 1111 (2d Cir. 1992) (noting that the purpose of the *Ex Post Facto* clause is both reliance and fair notice). Since this Court's decision in St. Cyr considered one of the three benchmarks for determining retroactivity to be "fair notice," this Court was essentially stating that *Ex Post Facto* cases are to be looked at in determining whether a statute is impermissibly retroactive.

Contrary to the Second Circuit, the Eighth Circuit has utilized *Ex Post Facto* cases in its retroactivity analysis See Alvarez-Portillo v. Ashcroft, 280 F.3d 858, 867 (8th Cir. 2002). In Alvarez-Portillo, the Eighth Circuit analyzed whether IIRIRA's amendments to the provisions of the INA relating to reinstatement of prior deportation orders could be applied to conduct that pre-dated its enactment. In doing so, the Eighth

Circuit utilized *Ex Post Facto* analysis to conclude that the proper date for determining retroactive effect is the date of the individual's wrongful conduct. The Eighth Circuit stated:

> The presumption against retroactivity of civil statues is based in part on principles reflected in the *Ex Post Facto* Clause, Article I, § 10, cl. 1, of the Constitution. Landgraf, 511 U.S. at 266. A core *ex post facto* principle is that a new statute may not deprive a criminal defendant of a defense available at the time his alleged crime was committed. See Collins v. Youngblood, 497 U.S. 37, 52, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990). Hughes Aircraft [520 U.S. 939 (1997)] confirmed that this principle is fully applicable in defining impermissible retroactive effects in civil cases under part two of the Landgraf analysis.

Alvarez-Portillo, 280 F.3d at 867. (emphasis added).

This Court's retroactivity analysis in criminal *Ex Post Facto* cases offers the most straight-forward and functional approach to determining retroactive effect. It looks at the date of the alleged criminal conduct to analyze whether new laws have retroactive effect. The date of conduct is an appropriate yardstick because it provides a clear and enforceable test that avoids the need for a case by case review of the retroactivity issue.

Contrary to Domond, it would not border on the absurd not to apply AEDPA and IIRIRA retroactively under *Ex Post Facto* analysis as employed by this Court. Thus, because the Second Circuit is not properly applying this Court's precedents, the Second Circuit is not deciding its retroactivity cases

properly.

IV. THE SECOND CIRCUIT FAILED TO FOLLOW THIS COURT'S HOLDING IN HUGHES AIRCRAFT v. UNITED STATES *ex rel.* SCHUMER THAT THE ELIMINATION OF A DEFENSE IN CIVIL PROCEEDINGS HAS AN IMPERMISSIBLE RETROACTIVE EFFECT

The Court should grant the petition for *certiorari* because the Second Circuit's decision is inconsistent with this Court's decision in Hughes Aircraft Co. v. United States *ex rel.* Schumer, 520 U.S. 939 (1997). In Hughes Aircraft Co., the Court found retroactive effect when a 1986 amendment was applied to a case submitted prior to the amendment's adoption, causing a private party to lose a defense against private suits for submitting a false claim to the government. Elimination of the defense in question technically did not increase the defendant's liability exposure because the defense had never been available in suits brought by government litigators. The Court stated that:

> while we acknowledge that the monetary liability faced by [this] defendant is the same whether the action is brought by the Government or a qui tam relator, the 1986 amendment eliminates a defense to a qui tam suit -- prior disclosure to the Government -- and therefore changes the substance of the existing cause of action ... by "attaching a new disability, in respect to transactions or considerations already past."

Id. at 948 (quoting Landgraf, 511 U.S. at 269) (emphasis added).

The new disability is the deprivation of a prior defense. The application of AEDPA § 440(d) or IIRIRA § 304(b) to a non-citizen who committed a prior criminal offense would have a retroactive effect similar to that in Hughes Aircraft. The elimination of the right to apply for section 212(c) relief, like the elimination of the prior government disclosure defense in Hughes Aircraft, does not change the magnitude of the alien's potential liability. It does, however, increase the likelihood that this liability, i.e., deportation, will be imposed, and it does so by eliminating prior available relief.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted.

Respectfully submitted,

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UNITED STATE COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term, 2003

(Argued: December 3, 2003 Decided: February 23, 2004)

Docket No. 03-2019

LOUIS EVANGELISTA,

Petitioner-Appellant,

- v -

JOHN ASHCROFT, Attorney General of the United States; JAMES ZIGLAR, Commissioner of the Immigration & Naturalization Service; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

Respondents-Appellees.

Before: CARDAMONE, SACK, and GIBSON,* Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Leonard D. Wexler, Judge) dismissing the petitioner-appellant's petition for a writ of habeas corpus preventing his deportation to Italy because (1) he was convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(ii), for which he thereby became deportable, and (2) discretionary relief from deportation was not available to him.

Affirmed.

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* The Honorable John R. Gibson, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

MATTHEW L. GUADAGNO, Bretz & Coven, LLP (Kerry William Bretz and Jules E. Coven, Of counsel), New York, NY, for Petitioner-Appellant.

DIONE M. ENEA, Special Assistant United States Attorney for the Eastern District of New York (Roslynn R. Mauskopf, United States Attorney, and Varuni Nelson, Assistant United States Attorney, of counsel), Brooklyn, NY, for Respondents-Appellees.

SACK, Circuit Judge:

The petitioner-appellant, Louis Evangelista, appeals from a judgment of the United States District Court for the Eastern District of New York (Leonard D. Wexler, Judge) dismissing his petition for a writ of habeas corpus to prevent his deportation[1] to Italy. The district court held that Evangelista had been convicted of an offense "described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000," 8 U.S.C. §1101(a)(43)(M)(ii), for which he was deportable under the

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[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104—208, Div. C, 110 Stat. 3009-546, "realigned the vocabulary of immigration law, creating a new category of 'removal' proceedings that largely replaces what were formerly exclusion proceedings and deportation proceedings." Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 966 (1998); see also Mohammed v. Reno, 309 F.3d 95, 96 (2d Cir. 2002) (referring to the change in nomenclature). We nonetheless use the terms "deport" and "deportation" from time to time in this opinion as well-worn colloquialisms for "remove" and "removal," respectively.

Immigration and Nationality Act (the "INA"). We agree with the district court's conclusion, although on grounds that differ somewhat from those on which the district court relied.

The district court also held that Evangelista was not eligible for a waiver of deportation because he was convicted of the offense at issue after Congress had abolished such relief for persons convicted of an aggravated felony. The unavailability of a waiver is not impermissibly retroactive in this case, the district court reasoned, because irrespective of the timing of the underlying criminal conduct, Evangelista's conviction of the relevant crime occurred when the waiver was no longer available.

BACKGROUND

The petitioner-appellant, Louis Evangelista, is a sixty-three-year-old native and citizen of Italy. He has been a lawful permanent resident of the United States since 1961. In 1995, a superseding indictment was filed in the United States District Court for the Eastern District of New York charging Evangelista with various federal tax crimes involving events that occurred as early as 1988. In count 26 of the superseding indictment, Evangelista was charged with "willfully attempt[ing] to evade and defeat [an] income tax by failing to pay said income tax to the Internal Revenue Service and by concealing and attempting to conceal from all proper officers of the United States of America his true assets" in violation of 26 U.S.C.§ 7201. Superseding Indictment at 16, United States v. Evangelista, No. 94-CR-1277(S-2) (LDW) (E.D.N.Y. 1996) (emphasis added).

Evangelista pleaded not guilty to all of the counts against him. However, a jury found him guilty on all counts. The

district court's judgment of conviction, dated October 29, 1996, states that Evangelista was adjudged guilty under count 26 of "[a]ttempt[ing] to evade or defeat tax" in violation of 26 U.S.C. § 7201. Judgment of Conviction, United States v. Evangelista, No. CR 94-1277(S-2) (E.D.N.Y. Oct. 29, 1996) (emphasis added). Evangelista appealed his conviction to this Court. We affirmed. See United States v. Evangelista, 122 F.3d 112, 114 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998). Our opinion focused primarily on counts under 26 U.S.C. § 7202, not on the section 7201 counts. Id. at 116-22. But we did note in passing that Evangelista "was convicted of evading personal income taxes (in violation of 26 U.S.C. § 7201)," id. at 113 (emphasis added), and that "[t]he jury found [Evangelista and another defendant] guilty on all of the counts with which they were charged," id. at 116.

As a result of Evangelista's conviction, on April 14, 1998, the Immigration and Naturalization Service ("INS") issued to Evangelista a Notice To Appear, stating that he was subject to removal from the United States for having been convicted of an "aggravated felony" as defined in the INA, 8 U.S.C. §1101(a)(43)(M)(ii). Section 1101(a)(43) contains a lengthy list of those crimes constituting an "aggravated felony" for the purpose of determining who is deportable under the INA. The list includes as an aggravated felony in section 1101(a)(43)(M)(ii)-- the section relevant to the Notice To Appear -- "an offense that . . . is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000." Id.

In removal proceedings before an Immigration Judge ("IJ"), Evangelista challenged his potential deportation. He first contended that he had not been convicted of an aggravated felony because there was no clear and convincing evidence that

he had been convicted under count 26 of evading taxes, rather than defeating taxes, and that only evading taxes constitutes an aggravated felony under the INA. Evangelista also argued that he was eligible for a waiver of deportation pursuant to former section 212(c) of the INA, 8 U.S.C. § 1182(c) (1994) (repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-546, 3009-597), because at the time of his criminal conduct he was eligible for the waiver. The IJ, rejecting Evangelista's arguments, ordered his removal.

Evangelista appealed the IJ's decision to the Board of Immigration Appeals ("BIA"). The BIA held that Evangelista had been convicted of an aggravated felony within the meaning of the INA. First, the BIA concluded that Evangelista had been convicted of tax evasion, an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(ii). The BIA relied on (1) the judgment of conviction, which stated that Evangelista was found guilty on count 26 for attempting to evade or defeat taxes in violation of 26 U.S.C. § 7201, (2) the indictment, which set out count 26 as a charge of both evading taxes and defeating taxes, and (3) our decision on Evangelista's appeal, which referred to Evangelista as having been convicted of tax evasion. Second, the BIA reasoned that even if Evangelista had been convicted under section 7201 only of defeating taxes and not of evading them, he would nonetheless have committed an aggravated felony under the INA, because the parenthetical phrase in the relevant section -- "(relating to tax evasion)"-- is merely descriptive of the substance of section 7201. According to the BIA, the parenthetical phrase does not limit the definition of an aggravated felony under section 1101(a)(43)(M)(ii) to those offenses that involve tax evasion, but also includes those that involve defeating taxes. And third, the BIA concluded that even if the "relating to tax evasion" parenthetical phrase

restricted the scope of section 1101(a)(43)(M)(ii) to convictions relating to tax evasion under 26 U.S.C. § 7201, defeating taxes was "relat[ed] to tax evasion" and therefore qualified as an aggravated felony. The BIA then held that Evangelista was not eligible for a waiver of deportation under former section 212(c) because he was convicted and formal deportation proceedings against him were begun only after the section was repealed. The BIA therefore dismissed Evangelista's appeal. See In re Evangelista, No. A12 352 319 (B.I.A. Oct. 25, 2000).

Evangelista then filed in the district court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 seeking relief from deportation. The court denied his petition. See Evangelista v. Ashcroft, 232 F. Supp. 2d 30 (E.D.N.Y. 2002). Relying on the conjunctive language in count 26 of the indictment ("willfully attempt[ing] to evade and defeat [an] income tax" (emphasis added)) and our opinion on Evangelista's appeal, the court concluded that "there can be no doubt that Evangelista was convicted of an offense 'described in section 7201 of Title 26 (relating to tax evasion) in which the revenue lost to the Government exceeds $10,000.'" Id. at 34 (quoting 8 U.S.C. § 1101 (a)(43)(M)(ii)). The court therefore decided that Evangelista had been convicted of an aggravated felony and was deportable. Id. The district court also concluded that relief from deportation under former INA section 212(c) was not available to Evangelista, "a criminal defendant [who] elect[ed] to go to trial in connection with conduct or a conviction that pre-dates the repeal of Section 212(c), but [who was] convicted and placed in removal proceedings after the repeal of the statute." Id. at 37. According to the district court, it is the date of conviction, not the date of the criminal conduct or of entry of a plea of not guilty, that controls. The court reasoned that there are no fairness concerns when the defendant elects to proceed to trial

-- as opposed to entering into a plea agreement -- before the repeal of section 212(c). Id. at 36. Evangelista appeals.

DISCUSSION

I. Conviction for an Aggravated Felony

"Any alien who is convicted of an aggravated felony at any time after admission [to the United States] is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). The INS "has the burden of establishing [deportability] by clear and convincing evidence," which must be "reasonable, substantial, and probative." Id. § 1229a(c)(3)(A).

We have no jurisdiction to review a final order of removal against an alien who is removable for having committed an aggravated felony. Id. § 1252(a)(2)(C). But "[w]e do retain jurisdiction . . . to review the question whether, as a matter of law, [a petitioner] committed an 'aggravated felony' under [the INA]." Dalton v. Ashcroft, 257 F.3d 200, 203 (2d Cir. 2001). We therefore have jurisdiction to review whether Evangelista was convicted of an aggravated felony under the INA.

The INA sets forth a list of offenses that qualify as types of aggravated felonies. Among them is "an offense that . . . is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(ii). 26 U.S.C. § 7201 in turn criminalizes "willful[] attempts in any manner to evade or defeat any tax imposed by [Title 26] or the payment thereof." We therefore must decide whether Evangelista's conviction under 26 U.S.C. § 7201 falls within the scope of section 1101(a)(43)(M)(ii), thus rendering him deportable.

A. Standard of Review

"On appeal from the denial of a habeas petition brought pursuant to 28 U.S.C. § 2241, we review the merits of the petition de novo." Chrzanoski v. Ashcroft, 327 F.3d 188, 191 (2d Cir. 2003). We review the BIA's interpretation of ambiguous provisions of the INA, however, with substantial deference to the BIA. Dickson v. Ashcroft, 346 F.3d 44, 48 (2d Cir. 2003), rejecting its interpretation only if it is "arbitrary, capricious, or manifestly contrary to the statute," Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837, 844 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Id. at 842-43. We review de novo the BIA's interpretation of federal criminal statutes, such as 26 U.S.C. § 7201, because we and not they are charged with the responsibility of such interpretation. See Dickson, 346 F.3d at 48; see also Ming Lam Sui v. INS, 250 F.3d 105, 116 (2d Cir. 2001) (reviewing de novo whether a petitioner's conviction fits within the BIA's reasonable interpretation of a subsection of the definition of "aggravated felony").

B. Scope of Section 1101 (a) (43) (M) (ii)

1. The Arguments. Evangelista argues that the language of 8 U.S.C. § 1101(a)(43)(M)(ii) -- an offense "described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000" -- together with the rule of lenity, require us to interpret that section to render deportable only persons convicted for tax evasion under 26 U.S.C. § 7201, and not those convicted of "defeat[ing] a[] tax" under that section. He contends further that the crime of "defeat[ing] a[] tax" is not a section 7201

crime "relat[ed] to tax evasion," under the language of the parenthetical phrase, because "'[e]vasion' appears to involve concealment of assets, whereas 'defeating' appears to involve improper tax avoidance, unlawfully minimizing one's tax liability, or other refusal to pay tax." Petitioner's Br. at 16. Evangelista urges us to conclude that because only tax evasion and section 7201 crimes related to tax evasion are aggravated felonies under the INA and because the INS did not meet its burden of proof to establish that Evangelista was convicted of tax evasion or a section 7201 crime "relating to tax evasion," he is not deportable for commission of an aggravated felony under the INA.

The government responds that the language of section1101(a)(43)(M)(ii) provides that any conviction under 26 U.S.C. § 7201 is an aggravated felony, provided that the revenue loss to the government exceeds $10,000, because the parenthetical phrase "relating to tax evasion" is merely descriptive of the offenses set out in 26 U.S.C. § 7201. And, the government continues, even if section 1101 (a)(43)(M)(ii) is restricted to convictions under 26 U.S.C. § 7201 for offenses described in the parenthetical phrase -- "relating to tax evasion" -- a conviction for "defeat [of a] tax" is a conviction under 26 U.S.C. § 7201 that "relat[es] to tax evasion," because there is no legal distinction between tax evasion and "defeat [of a] tax." The government asks us to conclude that Evangelista is removable whether convicted us to conclude that Evangelista is removable whether convicted under section 7201 of tax evasion, defeating taxes, or both.

2. Analysis. There are, it seems to us, at most four offenses described in 26 U.S.C. § 7201: (1) "evad[ing] . . . a[] tax"; (2) "defeat[ing] a[] tax"; (3) "evad[ing] . . . the payment thereof;" and (4) "defeat[ing] . . . the payment thereof." Cf.

Sansone v. United States, 380 U.S. 343, 354 (1965) ("As this Court has recognized, § 7201 includes the offense of willfully attempting to evade or defeat the assessment of a tax as well as the offense of willfully attempting to evade or defeat the payment of a tax." (emphasis omitted)). Although Evangelista attempts to distinguish between "defeat[ing]" a tax and "evad[ing]" a tax, courts and commentators use the two terms interchangeably. See, e.g., id. at 351 ("As has been held by this Court, the elements of § 7201 are willfulness; the existence of a tax deficiency; and an affirmative act constituting an evasion or attempted evasion of the tax." (citations omitted)); United States v. Schwartz, 325 F.2d 355, 356 (3d Cir. 1963) (noting first that the defendant was indicted for tax evasion and then that the substance of the charge is that he willfully attempted to defeat the payment of taxes); Ian M. Comisky, Lawrence S. Feld & Steven M. Harris, Tax Fraud & Evasion ¶ 7.01[2][a] (2004) ("[Section] 7201 defines two distinct crimes: (1) the willful attempt to evade or defeat any tax and (2) the willful attempt to evade or defeat the payment of any tax."). We conclude from this that whatever differences there may be between them, "defeat [of a] tax" is at least "relat[ed] to tax evasion," rendering a conviction for it an "aggravated felony" within section 1101(a)(43)(M)(ii). Whether Evangelista was convicted under 26 U.S.C. § 7201 of evading taxes, defeating taxes, or both, according to the accepted usage of the terms, he was convicted of an aggravated felony under section1101(a)(43)(M)(ii). We therefore agree with the BIA's reading of section 1101(a)(43)(M)(ii).

This reading of "relating to tax evasion" obtains whether the parenthetical phrase in section 1101(a)(43)(M)(ii) has a restrictive meaning, as Evangelista argues, or a descriptive meaning as the government argues and as the BIA determined. And inasmuch as we see no ambiguity in the scope of section

1101(a)(43)(M)(ii) as applied to Evangelista, the rule of lenity has no place in our analysis. See INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (noting "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("We resolve . . . doubts in favor of [a] construction [of a deportation statute in favor of a habeas corpus petitioner] because deportation is a drastic measure and at times the equivalent of banishment or exile. . . . [S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." (emphasis added)).

In United States v. Monjaras-Castaneda, 190 F.3d 326 (5th Cir. 1999), cert. denied, 528 U.S. 1194 (2000), the Fifth Circuit took a somewhat different approach in reaching a similar conclusion in a similar case. 8 U.S.C. § 1101(a)(43)(N) declares "an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling)" to be an aggravated felony. In interpreting the parenthetical phrase as descriptive rather than restrictive, the Fifth Circuit relied on grammatical rules and the structure and context of section 1101(a)(43) as a whole to determine that the parenthetical phrase modifies "paragraph (1)(A) or (2) of section 1324(a) of this title" rather than "an offense." Id. at 329-30 (upholding an enhanced sentence that the defendant received for having committed an "aggravated felony," as defined by section 1101(a)(43)(N), for his conviction under 8 U.S.C. § 1324(a)(1)(A) of transporting aliens, which is arguably different from smuggling aliens); accord Patel v. Ashcroft, 294 F.3d 465, 472-73 (3d Cir. 2002) (holding, in reliance on Monjaras-Castaneda and other cases, that a habeas petitioner's conviction for harboring an alien under 8 U.S.C. § 1324 is an

"aggravated felony" under 8 U.S.C. § 1101(a)(43)(N), rendering the petitioner deportable); United States v. Galindo-Gallegos, 244 F.3d 728, 733-34 (9th Cir. (2001) (holding that a defendant's conviction for transporting aliens is an aggravated felony and that the defendant therefore deserved an enhanced sentence); United States v. Salas-Mendoza, 237 F.3d 1246, 1247-48 (10th Cir. 2001) (same).

The Monjaras-Castaneda court reasoned that traditional rules of grammar indicate that the parenthetical phrase in section 1101(a)(43)(N) modifies "paragraph (1)(A) or (2) of section 1324(a) of this title" because of its placement following those words instead of directly after the word "an offense." Monjaras-Castaneda, 190 F.3d at 329. It then noted that section 1101(a)(43) contains a long list of aggravated felonies that it references by statutory section. The court concluded that parenthetical phrases found throughout the statute were included to assist readers in identifying the crimes referred to by the statute, without having to endure the "long and arduous process" of "look[ing] up each section under in the Code." Id. at 330. The court then observed that other parenthetical phrases in that section are expressly restrictive. See id. (quoting 8 U.S.C. § 1101(a)(43)(F) (listing as an aggravated felony "a crime of violence (as defined in § 16 of Title 18, but not including a purely political offense) for which a term of imprisonment is at least one year") and 8 U.S.C. § 1101(a)(43)(J) (enumerating "an offense described . . . in section 1084 (if it is a second or subsequent offense)" as an aggravated felony)). The Fifth Circuit was of the view that had Congress intended the parenthetical phrase in section 1101(a)(43)(N) to be restrictive, it would have said so, as it had in the other subsections. Id.

We are not entirely comfortable with applying the

Fifth Circuit's approach to the case before us. Section 1101(a)(43)(L) deems to be an aggravated felony an offense described in:

> . . .
>
> (ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or
>
> (iii) section 421 of Title 50 (relating to protecting the identity of undercover agents).

8 U.S.C. § 1101(a)(43)(L). The legislative history indicates that the addition of section 1101(a)(43)(L)(iii) to what already included section 1101(a)(43)(L)(ii) served the purpose of "add[ing a] new offense[] to the definition relating to . . . revealing the identity of undercover agents." IIRIRA, H.R. Conf. Rep. No. 104-828, at 223 (1996). Plainly, the parenthetical phrases in subsection (L)(ii) and (L)(iii) distinguish between different parts of section 421 of Title 50 -- one relating to "undercover intelligence agents" and one relating to "undercover agents"; they therefore do not simply describe 50 U.S.C. § 421. Evangelista argues in his reply brief that the inclusion of both sections 1101(a)(43)(L)(ii) and (iii) as distinct type of an aggravated felony where the parenthetical phrases cannot be read as descriptive indicates that the similar parenthetical phrase in section 1101(a)(43)(M)(ii) is not descriptive either. Evangelista's objection is sufficiently compelling for us to refrain from adopting the reasoning of Monjaras-Castaneda for section 1101(a)(43)(N) as our analysis of the language of section 1101(a)(43)(M)(ii).

We conclude that irrespective of whether Evangelista was convicted of tax evasion under 26 U.S.C. § 7201, he was convicted of an offense "relating to tax evasion" under 26

U.S.C. § 7201. Evangelista is thus deportable.[2]

II. Section 212(c) Waiver of Deportation

Because we conclude that Evangelista is deportable, we must consider his argument that he is eligible for a waiver of deportation pursuant to former section 212(c) of the INA, 8 U.S.C. § 1182(c) (1994). He argues that the application of the INA would be impermissibly retroactive if it disqualified him from consideration for such a waiver under a repealed section of the INA, because that section was in effect when he violated 26 U.S.C. § 7201. He asserts that he relied on the waiver's availability, even though it had been repealed at the time he was convicted of the crime and when formal deportation charges were brought against him. The government responds that we are bound by our case law establishing that it is not impermissibly retroactive to deny discretionary relief to petitioners such as Evangelista, who, after the repeal, were convicted of an aggravated felony after a jury trial and against whom deportation proceedings were commenced. We agree with the government.

A. Repeal of Section 212(c)

A recent opinion by this Court succinctly sets forth the background of former INA section 212(c), which provided for discretionary relief from deportation:

> [T]he deportation of resident aliens who commit aggravated felonies is controlled by

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[2] Evangelista does not contest the BIA's finding that his crime caused revenue loss to the government exceeding $10,000, as required by 8 U.S.C. 1101(a)(43)(M)(ii).

> the Immigration and Nationality Act ("INA"). See 8 U.S.C. § 1227(a)(2)(A)(iii)(2001). Prior to 1997, aliens deportable under the INA could apply to the Attorney General for a discretionary waiver of deportation pursuant to § 212(c) of the INA. To qualify for such relief, an alien was required to show that he (1) was a lawful permanent resident of the United States, (2) had an unrelinquished domicile of seven consecutive years, and (3) had not committed an aggravated felony for which he had served a term of at least five years. See 8 U.S.C. § 1182(c) (1994). If the alien met these requirements, the Attorney General had the discretion to waive deportation.

Rankine v. Reno, 319 F.3d 93, 95 (2d Cir.), cert. denied sub nom. Lawrence v. Ashcroft, 124 S. Ct. 287 (2003). But in 1996,

> Congress enacted first the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which limited eligibility for relief under§ 212(c), see AEDPA, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (1996), and then the Illegal Immigration Reform and Immigrant Responsibility Act . . . which repealed INA § 212(c) completely, effective April 1, 1997. See IIRIRA, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, 597(1996). Section 212(c) relief was, in effect, replaced by a new form of relief

> called "cancellation of removal," 8 U.S.C. § 1229b, which allows the Attorney General to cancel removal proceedings for a class of resident aliens that does not include those convicted of an aggravated felony. In removal proceedings commenced after April 1, 1997, therefore, resident aliens convicted of an aggravated felony are no longer eligible for any form of discretionary relief from deportation.

Id. at 95-96.

B. Standard of Review

Whether the repealed section 212(c) may be applied to an alien convicted of an aggravated felony based on criminal acts that took place before the repeal is a question of law that we review de novo. Domond v. U.S. INS, 244 F.3d 81, 84 (2d Cir. 2001).

C. Retroactivity

We held in Domond that the repeal of section 212(c) "imposes no new legal consequences on aliens . . . whose criminal conduct pre-dates AEDPA, but whose conviction came after AEDPA's enactment. It is the conviction, not the underlying criminal act, that triggers the disqualification from § 212(c) relief." Id. at 85-86 (internal quotation marks omitted). We said that "it cannot reasonably be argued that aliens committed crimes in reliance on a hearing that might possibly waive their deportation." Id. at 86.

The Supreme Court subsequently addressed a related question in INS v. St. Cyr, 533 U.S. 289 (2001). It held that section 212(c) relief, though repealed, "remains available for aliens . . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." Id. at 326. The Court reasoned that "[g]iven the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA, preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." Id. at 323 (footnote omitted). The Court observed that it could "consider an alien's reasonable reliance on the continued availability of discretionary relief from deportation when deciding whether the elimination of such relief has a retroactive effect." Id. at 324.

Subsequently, two judges of the United States District Court for the Eastern District of New York each urged us to reconsider our holding in Domond in light of St. Cyr. See Mohammed v. Reno, 205 F. Supp. 2d 39, 39 (E.D.N.Y.) (Gleeson, J.) (following Domond, but stating that "Domond is at odds with controlling case law of the Supreme Court"), stay pending appeal vacated, 309 F.3d 95 (2d Cir. 2002); Beharry v. Reno, 183 F. Supp. 2d 584, 591 (E.D.N.Y. 2002) (Weinstein, J.) ("Domond . . . should be reconsidered as the courts interpret and develop the Supreme Court's more recent immigration rulings and the requirements of international law."), rev'd sub nom. Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003).

We have reconsidered Domond's viability in light of St. Cyr in several cases, and in each concluded that Domond remains good law despite St. Cyr. See, e.g., Khan v. Ashcroft, 352 F.3d 521, 525 (2d Cir. 2003); Beharry v. Ashcroft, 329

F.3d 51, 63 (2d Cir. 2003); Mohammed v. Reno, 309 F.3d 95, 103 (2d Cir. 2002); accord Swaby v. Ashcroft, --- F.3d ---, ---, 2004 WL 193576, at *4, 2004 U.S. App. LEXIS 1569, at *15-*17 (2d Cir. Feb. 3, 2004); Rankine, 319 F.3d at 102; Dias v. INS, 311 F.3d 456, 458 (1st Cir. 2002) (per curiam), cert. denied, 123 S. Ct. 2574 (2003); Chambers v. Reno, 307 F.3d 284, 286 (4th Cir. 2002); Armendariz- Montoya v. Sonchik, 291 F.3d 1116, 1121-22 (9th Cir. 2002), cert. denied, 123 S. Ct. 2247 (2003).

Rankine is directly on point. We held there that "the repeal of § 212(c) relief does not have an impermissibly retroactive effect when applied to" an alien against whom the INS commenced formal removal proceedings after the passage of AEDPA and IIRIRA, but who was convicted of an aggravated felony for criminal conduct that occurred before the passage. Rankine, 319 F.3d at 102. We reasoned that St. Cyr did not directly govern Rankine's outcome because the former case involved a petitioner who pleaded guilty before the repeal of section 212(c), while the latter involved petitioners who pleaded not guilty, proceeded to trial, and were convicted before the repeal of section 212(c). Id. at 99.[3] This difference was material in two ways:

> First, none of these petitioners [who proceeded to trial] detrimentally changed his position in reliance on continued eligibility

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[3] The only difference between Rankine and the instant case is that in Rankine, the petitioners were convicted before the passage of AEDPA and IIRIRA, see Rankine, 319 F.3d at 96, while Evangelista was convicted after the passage of AEDPA and IIRIRA. If anything, that means that the petitioners in Rankine had a stronger case than Evangelista has, so the holding of Rankine must apply to him.

> for § 212(c) relief. Unlike aliens who entered pleas, the petitioners made no decision to abandon any rights and admit guilt -- thereby immediately rendering themselves deportable - in reliance on the availability of the relief offered prior to IIRIRA. The petitioners decided instead to go to trial, a decision that, standing alone, had no impact on their immigration status. Unless and until they were convicted of their underlying crimes, the petitioners could not be deported. . . .
>
> Second, the petitioners have pointed to no conduct on their part that reflects an intention to preserve their eligibility for relief under § 212(c) by going to trial.

Id. at 99-100. Because Rankine and its reasoning squarely govern Evangelista's challenge, we conclude that denial of section 212(c) relief to Evangelista is not impermissibly retroactive.[4]

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[4] In his reply brief, Evangelista urges for the first time that he could show detrimental reliance on repealed section 212(c) because he could have, but did not, file an administrative motion for a discretionary waiver of deportation before the repeal of the waiver for aggravated felons. At oral argument, the government replied that this argument is not properly before us because it was made for the first time in Evangelista's reply brief. The government continued that on the merits, Evangelista had no reliance interest because he did not file such a motion and, moreover, because he could not file such a motion until he became eligible for deportation upon his conviction, which postdated the repeal of waiver for aggravated felons. We do not consider the merits of Evangelista's argument, because "[w]e will not consider an argument raised for the first time in a reply brief." See

Evangelista therefore does not qualify to apply for a waiver of deportation.

CONCLUSION

For the foregoing reasons, we conclude that the district court properly dismissed Evangelista's petition for a writ of habeas corpus. The judgment of the district court is affirmed.

United States v. Yousef, 327 F.3d 56, 115 (2d Cir. 2003).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
LOUIS EVANGELISTA,

Petitioner, CV 01-6126

-against- (Wexler, J.)

JOHN ASHCROFT, et al.,

Respondents.
----------X

MEMORANDUM AND ORDER

FILED
IN CLERK'S OFFICE
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WEXLER, District Judge

Petitioner Louis Evangelista ("Petitioner" or "Evangelista") seeks a writ of habeas corpus requiring the Immigration and Naturalization Service ("INS") to hold a hardship-based hearing on relief from deportation. A decision on the merits of this claim was initially held in abeyance pending a decision by the Second Circuit in the appeal of the case of Jankowski-Burczyk v. INS, 138 F. Supp.2d 269 (D. Conn. 2001).

On May 29, 2002, the Second Circuit reversed the decision of the district court in Jankowski-Burczyk. See Jankowski-Burczyk v. INS, 2002 WL 1066630 (2d Cir. May 29, 2002). The effect of the Second Circuit's ruling was to foreclose one of Petitioner's arguments. Specifically, Petitioner was no longer in a position to argue that the statute denying him the right to seek a discretionary waiver of deportation was unconstitutional.[1]

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[1] Petitioner, like the petitioner in Jankowski-Burczyk, is a lawful permanent resident ("LPR") of the United States. The relevant statute, 8 U.S.C. § 1182, does not allow LPRs to seek a discretionary hardship relief from deportation while such a right is afforded to non-LPRs. The District Court held that this distinction violated the Equal Protection clause of the United States Constitution. The Second Circuit held the distinction to be rational, and reversed the District Court.

After the decision by the Second Circuit in Jankowski-Burczyk, this court ordered additional briefing in June 2002. Thereafter, the government was granted until October 2002 to respond to a letter submitted by Petitioner's counsel. That letter has now been submitted and the matter is now fully briefed, submitted and ripe for adjudication.

BACKGROUND

I. Evangelista's Background and Criminal Conviction

Evangelista is a native of Italy who has been a lawful permanent resident of the United States since 1961. Although Evangelista never became a citizen of this country, his wife is a naturalized United States citizen. His five adult children were all born in this country and remain residents of the United States.

In October of 1996, Evangelista was convicted, after a jury trial, of tax evasion. Specifically, Evangelista was convicted of conspiracy to impede the IRS in collection of income and payroll taxes in violation of 18 USC § 371, failure to collect or pay income/FICA taxes in violation of 26 USC § 7202 and attempt to evade or defeat tax in violation of 26 USC § 7201. After his conviction, Evangelista was sentenced to a 51 month term of imprisonment.

II. Proceedings Before the INS

In 1999, Evangelista was placed in removal proceedings

by the INS.[2] The government's decision to seek to remove Evangelista from this country was based upon his conviction of an aggravated felony. See 8 U.S.C. §1101(a)(43)(M)(ii). Evangelista sought administrative relief from deportation before the INS. In a decision dated April 11, 2000, an Immigration Judge ("IJ") denied the application. The decision of the IJ held, specifically, that Evangelista was, indeed convicted of an "aggravated felony," within the meaning of the relevant statute. Further, the IJ held that Evangelista was ineligible for a waiver of deportation pursuant to 8 USC § 1182(c) (referred to by the IJ and hereinafter as "Section 212(c)"). The rejection of the request for a waiver hearing was based on the holding that Section 212(c) was repealed and no longer available to individuals who, like Evangelista, were facing deportation and as a result of a conviction dated after the statute's repeal.

Evangelista moved for reconsideration of the decision of the IJ, which application was denied on June 2, 2000. On October 25, 2000, the initial and reconsideration decisions of the IJ were upheld by the Board of Immigration Appeals ("BIA"). The BIA agreed that Evangelista was convicted of an aggravated felony and therefore held that he was subject to removal. The BIA held further that it did not matter that the conduct for which Evangelista was punished took place prior to the effective date of the repeal of Section 212(c); Evangelista was nonetheless ineligible to apply for a waiver of deportation pursuant to the repealed statute.

In September of 2001, Evangelista was released from

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[2] Under current law, certain proceedings, formerly known as "deportation" proceedings are now referred to as "removal" proceedings. For purposes of this matter, the court refers to INS attempts to remove Evangelista as either removal or deportation proceedings.

the custody of the Federal Bureau of Prisons, and, because of the foregoing proceedings, was placed in INS custody. Shortly thereafter, this action was commenced.

III. Proceedings After Transfer to INS Custody and Before This Court

On September 13, 2001, after being placed in the custody of the INS, Petitioner commenced this proceeding seeking release. Meanwhile, upon being transferred to the custody of the INS, Petitioner was advised, by notice dated December 3, 2001, that the decision to detain him would be reviewed, after ninety days, by the INS District Director (the "District Director"). Petitioner was advised that any release that might be granted would be dependent upon his ability to demonstrate to the satisfaction of the INS that he neither posed a risk of flight nor was a danger to the community. Evangelista applied for release while this action was pending.

At argument held before this court in October of 2001, counsel informed the court that on December 12, 2001, the District Director would be reviewing Petitioner's claim for release pursuant to an order of supervision under 8 U.S.C. § 1231(a)(6). In view of the impending INS action, this court denied the request for release without prejudice to renewal after the INS determination.

In a decision issued in January 2002, the District Director denied Petitioner's request for release. In support of its decision, the INS cited Evangelista's history of involvement in criminal activities, which involvement spanned several years, as well as Evangelista's behavior during his incarceration. These factors led the INS to conclude that Evangelista would present a threat to the community. Accordingly, the request for

bail was denied.

In view of the INS decision to deny Petitioner's request for release, he renewed the application denied without prejudice at the October argument. In May of 2002, this court issued. an opinion denying Petitioner's request for a writ of habeas corpus releasing him from custody pending a decision on the merits of his claim. It is to the merits of the initial petition that this court now turns.

DISCUSSION

I. Evangelista's Remaining Arguments

As noted above, one of Evangelista's arguments regarding his entitlement to a relief from deportation hearing has been foreclosed by the decision of the Second Circuit in Jankowski-Burczyk. Remaining are two arguments. First, Evangelista argues that he was not convicted of an aggravated felony within the meaning of the relevant statute. Second, Evangelista argues that, because the conduct for which he was convicted and his entry of a plea of not guilty took place prior to the repeal of Section 212(c), he remains entitled to a discretionary relief from deportation hearing. Neither claim has merit.

A. Evangelista Was Convicted of an "Aggravated Felony"

Evangelista was convicted, afer a jury trial, of: (1) conspiracy to impede the IRS in collection of income and payroll taxes in violation of 18 USC § 371; (2) failure to collect or pay income/FICA taxes in violation of 26 USC §7201, and (3) attempt to evade or defeat tax in violation of 26 USC § 7202.

After serving his term of incarceration, the INS issued

Evangelista a Notice to Appear, charging him with being removable from the United States pursuant to 8 USC § 1227(a)(2)(A)(iii). This section defines the class of deportable aliens to include those who have been "convicted of an aggravated felony at any time after admission." 18 USC § 1227(a)(2)(A)(iii). An "aggravated felony" is defined in the Immigration and Nationality Act ("INA") to include offenses that are "described in section 7201 of Title 26 (relating to tax evasion) in which the revenue lost to the Government exceeds $10,000." 8 USC § 1101(a)(43)(M)(ii).

Evangelista was convicted of, among other charges, 26 USC § 7201. This statute makes it unlawful to willfully attempt, in any manner to "evade or defeat" any tax. 26 USC §7201. The count of the indictment referring to this charge was count 26, which charged Evangelista with the willful attempt to evade and defeat income tax in an amount in excess of $300,000, by failing to pay income tax. Affirming Evangelista's conviction, the Second Circuit noted that he had been convicted of "evading personal income taxes (in violation of 26 USC § 7601). United States v. Evangelista, 122 F.3d 112, 113 (2d Cir. 1997).

Under these circumstances, there can be no doubt that Evangelista was convicted of an offense "described in section 7201 of Title 26 (relating to tax evasion) in which the revenue lost to the Government exceeds $10,000." 8 USC § 1101(a)(43)(M)(ii). This clearly constitutes an aggravated felony for which an alien such as Evangelista becomes deportable.

B. Evangelista Is Not Eligible For Relief From Deportation Pursuant to Former Section 212(c)

1. Relevant Statutory Framework

Prior to 1996, the Attorney General of the United States possessed broad power, pursuant to Section 212(c), to order a relief from deportation to individuals such as Evangelista who, inter alia resided in this country for seven years or more. INS v. St. Cyr, 533 U.S. 289, 294-95 (2001); Domond v. INS, 244 F.3d 81, 82 (2d Cir. 2001). In 1996, however, Congress passed two pieces of legislation that repealed the relief available under Section 212(c). See Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"); Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). See St. Cyr, 533 U.S. at 297.

Specifically, AEDPA made certain classes of criminals, including those convicted of an aggravated felony, ineligible for relief from deportation under Section 212(c). St. Cyr, 533 U.S. at 297. The IIRIRA, passed shortly thereafter, with an effective date of April 1, 1997, amended completely the INA and repealed Section 212(c) on a prospective basis. The new law replaces the Section 212(c) hearing with a "cancellation of removal" proceeding, codified at 8 USC §1229b(a). The cancellation of removal proceeding is unavailable to aliens convicted of an aggravated felony. Id.

Evangelista claims that because he engaged in unlawful conduct, was indicted and entered a plea of not guilty before the effective repeal of Section 212(c), the repeal of the statute should not apply and he is therefore entitled to a hearing for discretionary relief from deportation. It is to the effect of the

repeal of Section 212(c) on Evangelista's case that the court now turns.

2. Evangelista Has No Right To A Section 212(c) Hearing

Evangelista engaged in the acts alleged in the indictment and pled not guilty to the criminal charges in this matter prior to the effective dates of AEDPA and the IIRIRA. A jury trial was held and Evangelista was convicted of the offenses described above, however, on October 29, 1996, after the effective dates of both statutes. Removal proceedings were commenced years after those effective dates.

Evangelista argues that because both his conduct and the decision to go to trial took place prior to repeal of Section 212(c), denial of a hearing in his case amounts to an unlawful retroactive application of the law. In support of his argument, Petitioner relies heavily on cases holding that an individual who pled guilty or entered a plea of nolo contendre prior to the repeal of Section 212(c) is nonetheless entitled to the hearing. St. Cyr v. INS, 229 F.3d 406, 418 (2d Cir. 2000), aff'd., 121 S. Ct. 2271 (2001); see also Gonzalez-Polanco v. INS, 2002 WL 1796834 *6 (S.D.N.Y. August 5, 2002).

The cases relied upon by Evangelista, however, focus on the expectations of individuals who choose to plead guilty instead of going to trial. Because such individuals expected, at the time of the plea, to be able to entitled to a Section 212(c) hearing, taking away that right would, according to the Second Circuit, "upset reasonable, settled expectations and change the legal effect of prior conduct." St. Cyr, 229 F.3d at 420-21.

When affirming the Second Circuit in St. Cyr, the Supreme Court similarly focused on the expected benefits of a

plea bargain and the unfair result of taking away a right that was undoubtedly considered at the time of the plea. Thus, the Court held that the "potential for unfairness" in denying a Section 212(c) hearing in cases involving pre-repeal pleas of guilty is "significant and manifest." St Cyr, 121 S. Ct. at 2291-93. As further noted by the Court:

> [p]lea agreements involve a quid pro quo between a criminal defendant and the government . . . in exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources.

St. Cyr, 533 U.S. at 321-22. Preservation of the Section 212(c) hearing would be "one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead proceed to trial." Id. at 322

The absence of outcome expectations in cases where a defendant chooses trial, rather than a plea, caused the Second Circuit to comment in St. Cyr that its holding was limited to the "narrow class of cases where an alien pled guilty to a criminal offense that qualifies as a removable crime." St. Cyr, 229 F.3d at 420-21. The court was quick to note that the newly amended INA would apply to all aliens whose convictions predate the IIRIRA and those who pled guilty after the repeal of Section 212(c). St. Cyr, 229 F.3d at 420-21.

In Domond v. INS, 244 F.3d 81 (2d Cir. 2002), the Second Circuit made it even clearer that the holding in St. Cyr,

was limited to those who pled guilty prior to the repeal of Section 212(c). There, the court rejected the claim that an individual whose criminal conduct took place prior to repeal of Section 212(c), but who pled guilty after the repeal, was entitled to a relief from deportation hearing. Rejecting the notion that expectations of a hearing must be protected, the Second Circuit stated that it could not "reasonably be argued that aliens committed crimes in reliance on a hearing that might possibly waive their deportation [and] 'it would border on the absurd to argue' that [the defendant] would have decided not to commit a crime if he had known that he not only could be imprisoned, but also face deportation without the availability of a discretionary waiver of deportation." Domond, 244, F.3d at 86, quoting St. Cyr, 229 F.3d at 418. [3]

In sum, Supreme Court and Second Circuit precedent make clear that individuals pleading guilty prior to the repeal of Section 212(c) are nonetheless entitled to a discretionary relief from deportation hearing. Second Circuit precedent makes it equally clear that the date on which the criminal conduct is engaged is irrelevant to application of the statute. Thus, where criminal conduct took place prior to repeal of the statute but the plea of guilty is entered after its repeal, there is no right to a hearing. Domond, 244 F.3d at 84-86; Soto v. Ashcroft, 2001 WL 1029130 *4-5 (S.D.N.Y. September 7, 2001).

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[3] Prior to St. Cyr, the Second Circuit held that Section 212(c) hearings remain available to those aliens who were placed in removal proceedings prior to the effective dates of AEDPA and IIRIRA. See Henderson v. INS, 157 F.3d 106 (2d Cir. 1999) Since Evangelista was not placed in removal proceedings until years after the enactment of the statutes repealing Section 212(c), Henderson has no relevance here.

District court cases in this circuit, decided in the wake of St. Cyr, have limited that case to its specific holding and have refused to find any entitlement to a Section 212(c) hearing unless the defendant entered a plea of guilty prior to repeal of the statute. For example, in Lawrence v. INS, 2001 WL 818141 * 5-6 (S.D.N.Y. July 20, 2001), the court held that the relevant date for application of law is the date upon which the Petitioner is placed in removal proceedings by the INS. Thus, the court rejected the claim that a Section 212(c) should be held even in a case where the petitioner's conviction pre-dated the repeal of Section 212(c), but whose removal proceedings were commenced after the repeal. Id. Accord Alfarache v. Cravener, 203 F.3d 381, 384 (5th Cir. 2000) (repeal of Section 212(c) applies to aliens convicted of crimes prior to enactment of AEDPA but who were placed in removal proceedings after its effective date); United States v. Herrera-Blanco, 232 F.3d 715, 719 (9th Cir. 1999) (same).

This court need not go so far in this matter. It is sufficient, for purposes of this opinion, to hold that Evangelista is not entitled to a Section 212(c) hearing for discretionary relief from deportation because his conduct took place prior to repeal of the statute and he was convicted after its repeal.

Evangelista seeks to place himself in the same position as the petitioner in St. Cyr, on the ground that he made the decision to plead not guilty and go to trial prior to repeal of the statute, but was thereafter convicted. The court declines to adopt Evangelista's position. Where, as here, a defendant elects to go to trial, rather than accept a plea bargain, the fairness considerations expressed by the Second Circuit and the Supreme Court in St. Cyr, simply not present. In such cases, there can be no expectation of a particular outcome. The defendant has decided to go to trial and assume the

consequences of whatever verdict a jury returns. He puts his fate, including his immigration status, in the hands of the jury and not those of the prosecution. Because Evangelista chose to go to trial, the reasonable expectations with which the courts in St. Cyr, were concerned are not present. Accordingly, he can claim no right to a Section 212(c) hearing.

A recent decision by the Second Circuit gives this court confidence in so holding. In Mohammed v. Reno, 2002 WL 31388971 (2d Cir. October 24, 2002), the court decided whether the petitioner was entitled to a stay of removal proceedings pending his appeal of a district court decision denying a motion for habeas corpus. The petitioner in Mohammed, like Evangelista, sought a discretionary relief from deportation hearing. Like Evangelista, Mohammed committed his crime prior to repeal of Section 212(c), but was convicted after the repeal. The district court denied Mohammed's petition, but ordered a stay of deportation pending appeal to the Second Circuit.

When deciding whether the stay was appropriate, the Second Circuit held that petitioner would be entitled to a stay only if he had a substantial possibility of success on the merits of his appeal. Holding that the stay should not have been imposed, the Second Circuit commented that the Supreme Court's affirmance of St. Cyr gave Mohammed "no basis for thinking that [he] had a substantial possibility of a successful appeal." Mohammed, 2001 WL 31388971 *5. The fact that Mohammed was convicted after repeal of Section 212(c) was held to divest him of any reliance on the possibility of a hearing.

Id. Likewise, Evangelista can claim no such reliance. [4]

In view of the foregoing, the court holds that where, as here, a criminal defendant elects to go to trial in connection with conduct or a conviction that pre-dates the repeal of Section 212(c), but is convicted and placed in removal proceedings after the repeal of the statute, there is no right to take advantage of the pre-repeal hearing.

II. A Remand to the BIA is Not Necessary

As a final matter, the court addresses Evangelista's request that this matter be remanded to the BIA. Evangelista argues that remand is necessary and prudent because neither the IJ nor the BIA ever discussed the retroactivity issue and pursuant to "well-established principals of administrative law," the issue should be decided at the administrative level in the first instance.

In support of this argument, Evangelista relies on Gelman v. INS, 298 F.3d 150 (2d Cir. 2002). While it is true that Gelman required a remand to the BIA for consideration of a matter of first impression, that case is readily distinguishable. In Gelman, the Second Circuit ordered a remand to the BIA to consider the impact of the Supreme Court's decision in St. Cyr on the particular legal issue raised in that case. The Gelman issue was one of retroactivity that was not decided by St. Cyr. The Second Circuit held it appropriate to refrain from deciding the issue "so as to avoid any premature interference with the

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4 The court notes that Evangelista has not yet been removed from the country. This "stay" of removal has been agreed upon between the parties here and is not pursuant to an order of the court.

agency's processes," to give the parties and courts the benefit of the agency's expertise, and to create an adequate record for judicial review. Gelman, 298 F.3d at 152, quoting, Arango-Arondo v. INS, 13 F.3d 610, 614 (2d Cir. 1994).

Unlike the issue raised in Gelman, the policies underlying the retroactivity raised issue here have been discussed by both the Second Circuit and the Supreme Court in St. Cyr. No novel issue of law is presented and there is therefore no benefit to remanding the case to have, as argued by Evangelista, the administrative agency decide the issue in the first instance. Moreover, there are no factual issues that need to be developed at the administrative level so as to "create an adequate record for judicial review. Gelman, 298 F.3d at 152. On the contrary, the legal issue and policy matters here have been discussed extensively by courts whose precedent bind this court in the same way that those precedents would bind the BIA. Because no purpose would be served by remanding a matter that requires no factual development and has been extensively explored, remand is required by neither common sense, administrative law, or by Gelman. Accordingly, the court rejects the notion that Gelman requires a remand.

CONCLUSION

For the foregoing reasons, the request for issuance of a writ of habeas corpus is denied. The Clerk of the Court is directed to close the file in this case.

SO ORDERED.

/s/ Leonard D. Wexler
LEONARD D. WEXLER
UNITED STATES DISTRICT JUDGE

Central Islip, New York
November 22, 2002

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A 12 352 319 - Whitedeer

Date: **OCT 25 2000**

In re: LOUIS EVANGELISTA, SR.

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Stanley H. Wallenstein, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)]Convicted of aggravated felony

APPLICATION: Termination

On April 11, 2000, the Immigration Judge found that the respondent was deportable as charged and ordered him removed to Italy. On June 2, 2000, the Immigration Judge denied the respondent's motion to reconsider that decision. The

respondent appealed. The request for oral argument is denied. *See* 8 C.F.R. § 3.1(e). The appeal will be dismissed.

The question presented in this case is whether the respondent has been convicted of an "aggravated felony" within the meaning of section 101(a)(43) of the Immigration and Nationality Act ("Act"). 8 U.S.C. § 1101(a)(43). An aggravated felony is defined, in pertinent part, as "an offense that . . . is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the government exceeds $10,000..." Section 101 (a)(43)(M)(ii) of the Act. In addition to other offenses not pertinent here, the United States District Court for the Eastern District of New York entered the following judgment against the respondent:

The defendant was found guilt on count . . . 26 of a 26 count superseding indictment after a plea of not guilty on February 28, 1996.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	26 USC 7201
Nature & Offense	Attempt to evade or defeat tax
Count Number(s)	. . . 26 (6/14/91)

Exh. 2 at 1. The criminal statute for which the respondent was convicted, 26 U.S.C. § 7201, provides as follows:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other

> penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Id. The respondent argues that because the judgment of conviction indicates that he was found guilty of an "attempt to evade or defeat tax," as opposed to an attempt to evade tax, that he does not fall within the reach of section 101(a)(43)(M)(ii) of the Act, which contains the parenthetical phrase "relating to tax evasion." *See* Respondent's Brief at 6, 15-16.

Count 26 of the indictment, of which the respondent was adjudged guilty, alleged that he "did willfully attempt to *evade and defeat* said income tax ($335,830) by failing to pay said income tax to the Internal Revenue Service and by concealing and attempting to conceal from all proper officers of the United States of America his true assets" (Exh. 2) (emphasis added). The respondent argues that although the indictment alleges that he evaded income tax, because he was convicted by a jury instead of upon a plea of guilty, we cannot look to the indictment in determining the conduct for which he was convicted. *See* Respondent's Brief at 8. We disagree. Here, where the judgment specifically finds that the respondent was "adjudged guilty" of count 26, we find that it is appropriate to look to indictment to determine if the respondent has committed an offense "relating to tax evasion." *Compare* Exh. 2, *with* section 101(a)(43)(M)(ii) of the Act. On the basis of the same conviction record that is before us, the United States Court of Appeals for the Second Circuit found that the respondent "was convicted of *evading* personal income taxes (in violation of 26 U.S.C. § 7201) . . ." *United States v. Evangelista*, 122 F.3d

112, 113 (2d Cir. 1997) (emphasis added).[1] Although the respondent argues that the Board must look to the *minimum* evidence required to satisfy a conviction in determining whether an offense constitutes an aggravated felony, we cannot disregard the findings of the Court of Appeals in order to do so. *Compare* Respondent's Brief at 16-17 (*citing Matter of Sweetster*, Interim Decision 3390 (BIA 1999)); *with United States v. Evangelista*, *supra*, at 113, 118.

Specifically, the respondent contends that the indictment only contains conduct that is descriptive of an attempt to "defeat" as opposed to "evade" tax. *See* Respondent's Brief at 8. The indictment alleged that the respondent had concealed and attempted to conceal his true assets from the Internal Revenue Service, which can constitute the willful commission of an act supporting a conviction for willfully attempting to evade or defeat a tax. *See United States v. Edwards*, 777 F.2d

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[1] The Court of Appeals rejected the respondent's contention that the district court erred in refusing to give the following instruction to the jury:

> If, in good faith a defendant truly believed that he could pay other debts and conduct transactions, while deferring payment to the IRS, then such defendant cannot be guilty of tax evasion. The defendant's good faith belief need not be objectively reasonable for you to find the defendant not guilty of tax *evasion*...

United States v. Evangelista, *supra*, at 118 (emphasis added). We note that the respondent's own argument on appeal confirms the circuit court's finding that he was convicted of "evading" taxes.
See id. at 113.

644 (11th Cir.), *cert. denied*, 475 U.S. 1123 (1985); *cf. United States v. Evangelista,* supra, at 113. The respondent further argues, without reference to pertinent authority, that tax evasion requires a showing of fraud while defeating a tax does not. *See* Respondent's Brief at 10-11. We note, however, that fraud is not an essential element of the offense of attempt to evade or defeat income tax. *See* 26 U.S.C. § 7201; *United States v. Albanese*, 117 F.Supp. 736 (S.D.N.Y.), *aff'd* 224 F.2d 879 (2d Cir.), *cert. denied* 350 U.S. 845 (1954); *United States v. Gordon*, 242 F.2d 122 (3d Cir.), *cert. denied* 354 U.S. 921 (1957); *Baker v. Miller*, 236 Ind. 20,138 N.E.2d 145 (1956).

Without regard to the indictment, we would still disagree with the respondent's contention that section 101(a)(43)(M)(ii) of the Act "applies only where the conviction is for evasion of tax, but not for defeating a tax." Respondent's Brief at 6. The parenthetical phrase "relating to tax evasion" modifies the prepositional phrase "in section 7201 of the Internal Revenue Code" in section 101(a)(43)(M)(ii) of the Act. Even if the respondent is correct that he has been convicted of defeating instead evading tax, he has still been convicted of an offense described in section 7201 of the Internal Revenue Code in which the loss to the Government exceeds $10,000 (Exh. 2). Furthermore, even if the respondent is correct that his specific offense must relate to tax evasion, and he had only been found guilty of conduct that constituted "an attempt to defeat" tax (but not an attempt to evade), we would still find that he had been convicted of an offense "relating to tax evasion." It is well established that the elements constituting a violation of the section proscribing an attempt to evade or defeat tax are wilfulness, a tax deficiency, and an affirmative act constituting an evasion or an attempted evasion of tax. See *Sansone v. United States*, 380 U.S. 343 (1965); *United States v. Coppola*, 425 F.2d 660 (2d Cir. 1969); *United States v. House*, 524 F.2d

1035 (3d Cir. 1975); *United States v. Hoover*, 233 F.2d 870 (3d Cir.), *cert. denied* 352 U.S. 840 (1956) (holding that so long as there exists affirmative and positive conduct coupled with a tax-evasion motive, a violation of this section making it a felony to wilfully attempt to evade or defeat tax exists). [2] We also note that 26 U.S.C. § 7201 makes no distinction between "evade or defeat" with respect to an offender's punishment. *See id.* For the foregoing reasons we find that the respondent has been convicted an offense described in 26 U.S.C. § 7201 (relating to tax evasions), in which the revenue loss to the (Government exceeds $10,000; and has thus been convicted of an "aggravated felony." *See* section 101(a)(43)(M)(ii) of the Act.

Finally, the respondent argues that because the criminal conduct underlying his offense occurred prior to the Antiterrorism and Effective Death Penalty Act of 1996, he is eligible for relief under section 212(c) of the Act. *See* Respondent's Brief at 17-18. We find that a waiver under former section 212(c) of the Act is not available to the respondent, against whom removal proceedings were

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[2] *United States v. Wilkins*, 385 F.2d 465 (4th Cir.), *cert. denied* 390 U.S. 951 (1967); *United States v. Doyle*, 956 F.2d 73 (5th Cir. 1992) (holding that willfulness involved in failing to file a tax return is not enough to support taxpayer's conviction for felony tax evasion, but requires proof of specific intent of taxpayer to defeat or evade payment of tax); *United States v. Kim*, 884 F.2d 189 (5th Cir. 1989); *United States v. Hook*, 781 F.2d 1166 (6th Cir.), *cert. denied* 479 U.S. 882 (1986); *United States v. DeNiro*, 392 F.2d 753 (6th Cir.), *cert. denied* 393 U.S. 826 (1968); *Davis v. United States*, 226 F.2d 331 (6th Cir.), *cert. denied* 350 U.S. 965, *reh'g denied* 351 U.S. 915 (1955); *United States v. Glascott*, 216 F.2d 487 (7th Cir.), *cert. denied* 348 U.S. 937 (1954); *United States v. Swanson*, 509 F.2d 1205 (8th Cir. 1975); *Imholte v. United States*, 226 F.2d 585 (8th Cir. 1955); *United States v. Boone*, 951 F.2d 1526 (9th Cir. 1991); *United State v. Voorhies*, 658 F.2d 710 (9th Cir. 1981);

commenced by the filing of a Notice to Appear with the Immigration Court on May 7, 1999 (Exh. 1). *See* 8 C.F.R. § 239.1(a); section 304(b) of IIRIRA. To the extent that the respondent is seeking relief from removal under section 212(c) of the Act, we note that this section is no longer part of the Act, as it was repealed and is not available in removal proceedings. *See* section 304(b) of IIRIRA. This change applies retroactively, in that IIRIRA specifically states that the changes therein apply to all convictions regardless of whether they "were entered before, on, or after the date of enactment of this paragraph." Section 321(b) of IIRIRA. As respondent is properly in removal proceedings, we find that he is not eligible to apply for waiver under former section 212(c), since it has been repealed and is unavailable in these proceeding. *See* Form I-862; section 239 of the Act (initiation of removal proceedings); section 304(b) of IIRIRA (repealing former section 212(c) of the Act).[3]

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[2] (...continued)
United States v. Buckner, 610 F.2d 570 (9th Cir.), *cert. denied* 445 U.S. 961 (1979); *United States v. Miller*, 545 F.2d 1204 (9th Cir.), *cert. denied* 430 U.S. 930 (1976); *United States v. Swallow*, 511 F.2d 514 (10th Cir.), *cert. denied* 423 U.S. 845 (1975) (holding that to prove the element of willfulness in a prosecution for a willful attempt to evade or defeat payment of federal income taxes, the Government must prove beyond a reasonable doubt that there was an attempt to evade the tax, made voluntarily and intentionally and with the specific intent of evasion); *United States v. Afflerbach*, 547 F.2d 522 (10th Cir.), *cert. denied* 429 U.S. 1098, *reh'g denied* 430 U.S. 976 (1976); *United States v. Jannuzzio*, 184 F.Supp. 460 (D. Del. 1960) (holding that in order to constitute a willful attempt to defeat or evade tax, there must be a deliberate act capable of deceiving, misleading or defeating a tax obligation known to exist, and the accused must have intentionally employed such device for tax evasion reasons); *see also United States v. Johnson*, 319 U.S. 503, *reh'g denied* 320U.S. 808 (1943); *United States v. Washington*, 947 F.Supp. 87 (S.D.N.Y.1996).

The respondent does not specifically identify any other form of relief that he wishes to apply for other than a waiver under section 212(c) of the Act. *See* Form EOIR-26; Respondent's Brief. We find that the respondent, as a lawful permanent resident convicted of an aggravated felony, is ineligible for cancellation of removal and a waiver under section 212(h). Sections 240A(a)(3) and 212(h) of the Act, 8 U.S.C. §§ 1229b(a), 1182(h); *see Matter of Yeung*, 21 I&N Dec. 610 (BIA 1997); *Matter of Pineda*, 21 I&N Dec. 1017 (BIA 1997). We also find that the respondent is statutorily ineligible for asylum and voluntary departure. Sections 208(b)(2)(A)(ii), (B)(i), and 240B(b)(1)(C) of the Act; 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i), and 1229c(b)(1)(C). We further note that the respondent has not alleged that he holds a fear of persecution or torture in Italy. We therefore find that the respondent has not demonstrated eligibility for withholding of removal or protection under the Convention Against Torture.[4] *See* section 241(b)(3) of the Act, 8 U.S.C. §

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3. With respect to the respondent's suggestion that we remand this case to the Immigration Judge to conduct an independent inquiry as to whether the denial of section 212(c) relief is impermissibly retroactive, we note that this Board and the immigration courts do not address the constitutionality of the laws we administer. *See Matter of C-*, 20 I&N Dec. 529 (BIA 1992); *cf.* Notice of Appeal (Form EOIR-26) at 2.

4. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987; for the United States April. 18, 1988) ("Convention Against Torture"). On October 21, 1998, legislation was signed into law directing the promulgation of regulations to implement the obligations of the United States under Article 3 of the Convention Against Torture, subject to any reservations, understandings, declarations, and provisions contained in the United States

1231(b)(3). For the foregoing reasons, the respondent is removable as charged, and has not demonstrated eligibility for relief from removal. Accordingly, the following order will be ordered.

ORDER: The appeal is dismissed.

[Illegible Signature]
FOR THE BOARD

Senate resolution of ratification of the Convention. *See* section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998, enacted as Division G of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, Pub. L. No, 105-277, 112 Stat 2681-761, 822 (Oct. 21, 1998).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
PHILADELPHIA, PENNSYLVANIA

File No.: A12 352 319

In the Matter Of:

EVANGELISTA, LOUIS SR.
Respondent

Charge: 237(a)(2)(A)(iii)

Application: Motion to Reconsider

IN REMOVAL PROCEEDINGS

ON BEHALF OF THE RESPONDENT:
Stanley Wallenstein, Esquire

ON BEHALF OF THE SERVICE:
Jeanine Linehan, Ass. District Counsel

MEMORANDUM OF DECISION AND ORDER

Respondent's Motion to Reopen is denied for the following reasons:

Counsel argues that it is somehow significant that the Court in its decision dated April 11, 2000 misstated that the respondent had entered a plea of guilty, when in fact he was found guilty by

a trial court. This distinction is of absolutely no significance to the substance of the Court's decision. The rest of Counsel's argument is equally fallacious.

ORDERED that Respondent's Motion to Reconsider is **DENIED**.

SO ORDERED THIS 2nd DAY OF June, 2000.

/s/ Paul Grussendorf
Paul Grussendorf
U.S. Immigration Judge
Philadelphia, Pennsylvania

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Philadelphia, Pennsylvania

File No: A 12 352 319 — April 11, 2000

In the Matter of
LOUIS EVANGELISTE SR.
Respondent
CHARGES:

APPLICATION:

IN DEPORTATION PROCEEDINGS

ON BEHALF OF RESPONDENT:
Stanley Wallenstein, Esquire

ON BEHALF OF SERVICE:
Jeanine Linehan, Esquire
Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

On April 14, 1999, the Immigration and Naturalization Service issued form I-862, a Notice to Appear, in the name of the respondent, Louis Evangeliste Sr. In the Notice to Appear it is alleged that the respondent is not a native or citizen of the United States, that he is a native and citizen of Italy. That he

was admitted to the United States at New York on or about October 25, 1961, as an immigration. That he was on October 29, 1996, convicted in the United States District Court at the Eastern District of New York for the offense of conspiracy to impede the IRS in collection of income and payroll taxes in violation of Title 18, United States Code Section 371, failure to collect or pay income and FICA taxes in violation of Title 26, United States Code Section 7202, and attempt to evade or defeat tax in violation of Title 26, United States Code Section 7201.

It is charged that the respondent is removable from the United States pursuant to Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act as amended in that at anytime after admission he has been convicted of an aggravated felony as defined at Section 101(a)(43) of the Act.

At a master calendar appearance Government moves to orally amend the charger of removability to indicate that Section 101(a)(43)(M)(iii) is meant and that motion was granted to orally amend. Also, at the master calendar, through counsel, the respondent admitted the four factual allegations but denied the charge of removability.

The issue before the Court is whether the respondent's conviction and the Government's proof of evidence in this case falls within the definition of an aggravated felony at 101(a)(43)(M)(ii).

Respondent's counsel has submitted a brief and argues that the respondent is not deportable under that provision of law and argues that the statute in question must be read in the disjunctive, that is that the statute indicates that the respondent can be convicted of either evading or defeating and that the

respondent was guilty of "defeating", that is that he failed to file income taxes as he has been charged and convicted but that he was not found guilty or convicted of evading and that therefore the statute is division and that the Government has not met its burden to show that the respondent is removable as charged under 101(a)(43)(M)(ii).

In the record is Exhibit 1, the Notice to Appear; Exhibit 2 is Government's submission of evidence which includes form I-213, record of deportable alien and a record of the judgement of conviction in this case which relates that the respondent was found guilty of counts one, counts two through 17, counts 21 through 25, and counts 26 of a 26 count superseding indictment; Tab 3 of Exhibit 2 is a copy of the superseding indictment and Tab 4 is a copy of the presentence investigation report.

The Court finds that for the purposes of this adjudication, both the judgement or record of conviction in this case and the superseding indictment is proper evidence. The Court would not admit the presentence investigation report at this juncture of the proceeding when the Court must make a determination as to whether or not the Government has met its burden of proving removability.

Board decisions have found that an indictment is a proper exhibit in removal proceedings when the Government must establish removability that it is part of the Court record and should be admitted. The Court finds it proper that when it is shown that the respondent pled guilty to count 1, and to count 2 through 17, for example, that the Court should peruse the superseding indictment, namely, counts 1, counts 2 through 17, etc, to ascertain what the nature of respondent's involvement and what the Government has charged the respondent with having been complicit of. The Court finds that counsel's

arguments, although interesting amounts to a house of cards the respondent clearly has been charged with and found guilty of evading as well as defeating income and payroll taxes. It is crystal clear through the manner in which the respondent was charged and found guilty that he was evading as well as defeating income taxes.

For this reason the Court finds that the Government has met its burden of establishing by evidence that is clear and convincing that the respondent is removable as charged as an aggravated felon at Section 101(a)(43)(M)(ii).

Respondent has argued that he should be eligible for consideration of 212(c), waiver of deportability, and he has filed a form I-191 which is with the record unmarked. The Court finds that the respondent is in removable proceedings, that the proceedings were initiated on April 14, 1999, and that the respondent, therefore, cannot apply for a form of relief which is not in the statute. Section 212(c) was eliminated by reforms of so called IRAIRA in 1996. The Court would also note that the respondent's conviction post-dated the date of when the reforms in IRAIRA became effective which was in September 1996.

For these reasons the Court must find that the respondent is removable and that he is not eligible for any relief from removal. He is not eligible for cancellation of removal or for 212(h) waiver of removability for voluntary departure and he has not evidenced any fear of return to Italy which would trigger either 241(b)(3) consideration or consideration under the convention against torture.

ORDER OF THE COURT

Wherefore, respondent shall be removed and deported to Italy.

/s/ Paul Grussendorf
PAUL GRUSSENDORF
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE

DOCKET NO.: 03-2919-PR
FILED JUNE 9, 2004

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 9th day of June two thousand four.

LOUIS EVANGELISTA,

Petitioner-Appellant,

v.

JOHN ASHCROFT, Attorney General; JAMES ZIGLAR, Commissioner of the Immigration & Naturalization Service; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

Respondents-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Louis Evangelista.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en

banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

[Illegible Signature]
Motion Staff Attorney

STATUTORY PROVISIONS INVOLVED

1. **Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c) (1995).**

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

2. **Section 440(d) of Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).**

CLASSES OF EXCLUDABLE ALIENS. –Section 212(c) of [the Immigration and Nationality Act]... is amended –

(1) by striking "The first sentence of this" and inserting "this"; and

(2) by striking "has been convicted of one or more aggravated felonies" and all that follows through the end and inserting "is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B),

(C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)."

3. **Immigration and Nationality Act § 212(c), 8 U.S.C. § 1182(c), as amended by AEDPA § 440(d) (1997).**

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in sections 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(I).

4. **Section 304(b) of Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104–208, 110 Stat. 3009–546 (September 30, 1996)**

REPEAL OF SECTION 212(c)—Section 212(c) (8 U.S.C. 1182(c)) is repealed.